Mr. CHARLES CHENEY HYDE. May I make a brief explanation before reading the statement? When Dr. Scott was good enough some time ago to ask me to take part today, I was simply snowed under in the effort to put through the press a book dealing with international law chiefly as interpreted by the United States, and the only possible means I had of complying with Dr. Scott's request was to secure the permission of the publishers to read a few advance sheets. That consent was readily given, but, Mr. Chairman, the problem is rather difficult for this reason, that while I am able to state the conclusions rather fully which have been reached touching one point, namely, the condition of foodstuffs as conditional contraband, it has been impossible in the brief time to deal with the vast material necessarily concerned. Therefore, if my summaries seem too brief, I ask your respectful indulgence.

CONDITIONAL CONTRABAND[1]

ADDRESS BY CHARLES CHENEY HYDE

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At the time when the United States declared its independence the experience of nations had developed a practice which, on the one hand, acknowledged the right of a belligerent to seize on the high seas property even of neutral ownership and found on board vessels of whatsoever national character, if destined to the enemy and calculated to aid its operations, and which, on the other, restrained a belligerent in determining under what circumstances property might be justly regarded as bearing such a relation to the enemy. It was the nature of the restraint as well as the scope of the right which it became the task of American statesmen to clarify. The significant fact is that long before the close of the eighteenth century there was an understanding apparent, in England as well as continental Europe, that a belligerent was not free to cut off generally neutral commerce with enemy territory. Such a situation was in sharp contrast to that which had once prevailed, when no State engaged in war hesitated to regard as hostile to itself, and therefore as subject to restraint, the ships or goods of any foreign merchant who ventured to trade with the enemy.[2]

[1] From the advance sheets of a book entitled: International Law Chiefly as Interpreted and Applied by the United States, and read with the consent of the publishers, Messrs. Little, Brown & Company, Boston.

[2] T. A. Walker, Hist. Law of Nations, I, 136, quoted in H. R. Pyke, Law of Contraband of War, 30. See, also, E. Nys, *Les Origines du Droit International*, 226–228; Westlake, 2 ed., II, 198; J. B. Moore, "Contraband of War," Philadelphia, 1912, *Proceedings, Am. Philosophical Society*, LI, No. 203, 39.

Concerning the practice of England during the sixteenth century, see Edward P. Cheyney, History of England from the Defeat of the Armada to the Death of Elizabeth, Philadelphia, 1914, I, chap. xxii, and documents there cited.

The reasons which had gradually compelled some measure of respect for the neutral claim may have been various. Possibly the most influential were the increasing inability of a belligerent to win respect for its pretensions, and the danger to itself involved in the attempt to enforce them.

While it would be inaccurate to attribute to Grotius the reasons which in England, and later in the United States were advanced in support of a belligerent right to capture and confiscate articles useful in the arts of peace as well as in the science of war, the doctrine of conditional contraband, as it was developed in those countries, doubtless owed much to his classification. That doctrine was based upon the theory that a belligerent should not be deterred from confiscating articles normally not to be deemed contraband, if it could be shown that they were actually destined for a hostile use by the enemy. If the application of this principle opened the way to abuse of power and so afforded opportunity for dangerous extension of the belligerent prerogative as understood in continental Europe, the advocates of it were at least able to maintain that it contemplated no unrestrained confiscation of articles not destined for a hostile use, and that it called for a moderation of conduct oftentimes not manifested by belligerent states committed to an opposing view.[3] Grave practical considerations pertaining both to the matter of proof and the nature of the use which should justify confiscation, served to render it increasingly difficult to obtain general agreement as to the precise circumstances justifying the confiscation of articles alleged to be conditional contraband. The procedure adopted in certain quarters proved to be a means of harassing rather than protecting neutral commerce. Moreover, the method of classification necessitated the use of tests which belligerents ignored in determining what should be regarded as absolute rather than conditional contraband.

Thus the controversy possessed a twofold aspect, with respect, first, to the nature of articles to be deemed generally subject to confiscation, and, secondly, to the circumstances when articles of a particular kind, such as those useful in the pursuits of peace as well as of war, should be treated as if they were contraband. Permanent adjustment required wide recognition of the true reason why a belligerent might justly endeavor to confiscate neutral goods consigned to the territory of the enemy. If that reason was merely the military necessity of the belligerent as conceived by itself, general acquiescence on the part of the family of nations would have assumed a form distinctly intolerant of neutral claims. In such case the embarrassment occasioned a belligerent through the commercial intercourse of neutrals with its adversary would have encouraged the former to resort to pretext for the treatment as contraband of any articles whatsoever, and thus to substitute for blockade a possibly more convenient method of cutting off access to enemy territory. If, on the other hand, the reason was founded on the right to prevent the enemy from deriving definite succor

[3] Westlake, 2 ed., II, 285.

as a belligerent from articles destined to its territory or to its forces, there was a solid ground on which a state engaged in war might base a claim to confiscate, and one also justifying resentment of the efforts of a neutral to obstruct the repression of a trade constituting participation in the conflict.

When the United States entered upon its being as a nation, two opposing ideas had long found expression in European conventions—that contained in the Treaty of the Pyrenees concluded between France and Spain, November 7, 1659,[4] confining articles of contraband to those of warlike character and excluding foodstuffs, and that set forth in the Treaty of Whitehall, concluded between Great Britain and Sweden, October 21, 1661, placing money and provisions in the same category as munitions of war.[5] The latter was thus declaratory of a theory hostile to the rights and interests of neutral maritime Powers, and sharply in contrast to the spirit of a series of conventions which the United States began to conclude.

These generally followed the theory of the Treaty of the Pyrenees; and it may be doubted whether the Jay Treaty of 1794 was designed to approve of any other.

Controversies respecting foodstuffs have always furnished practical tests of the reasonableness of the doctrine of conditional contraband. They shed light on the question whether it should be retained in the law of nations. By way of summary of the experience of the United States from 1793 until 1909 it may be observed: first, that the Department of State in diplomatic discussions steadfastly denied the right of a belligerent to deal with foodstuffs as absolute contraband; secondly, that it abstained from concluding treaties even in the nineteenth century declaring that such articles should be deemed even conditional contraband; thirdly, that the Supreme Court of the United States doubtless influenced by the views of Sir William Scott, both in 1816, and in the cases arising from the Civil War, gave definite recognition to the doctrine of conditional contraband; fourthly, that as a belligerent in 1898 the United States was disposed to apply the doctrine to foodstuffs; fifthly, that during the Russo-Japanese War, the United States as well as Great Britain maintained a similar stand, causing Russia to yield thereto.

It will be recalled that the Second Hague Peace Conference of 1907 produced no convention dealing with contraband, but that it was proposed on behalf of the United States, that the right of capture should be confined to articles agreed to be absolute contraband.

The Declaration of London of 1909 enumerated lists of articles to be treated as absolute contraband, and as conditional contraband, and of those not to be declared contraband. Foodstuffs were placed in the con-

[4] Arts. XII and XIII, *Les Grands Traités du Règne de Louis XIV*, Paris, 1893, 100, 101; Dumont, VI, 266.

[5] Art. XI, Brit. and For. State Pap., I, 701, 705.

ditional class.[6] Conditional contraband was, according to Article XXXIII, liable to capture if shown to be destined for the use of the armed forces or of a government department of the enemy state, unless in the latter case the circumstances showed that the articles could not in fact be used for the purposes of the war in progress.[7] The destination referred to in that article was presumed to exist if the goods were consigned to enemy authorities, or to a contractor established in the enemy country who, as a matter of common knowledge, supplied articles of such a kind to the enemy. A similar presumption was said to arise if the goods were consigned to a fortified place belonging to the enemy, or other place serving as a base for the armed forces of the enemy. No such presumption was, however, to be raised in the case of a merchant vessel bound for one of such places, and if it was sought to prove that she herself possessed a contraband character. In cases where the foregoing presumptions did not arise it was declared that the destination was presumed to be innocent. The presumptions established in the article were capable of rebuttal.[8] Conditional contraband was, moreover, rendered not liable to capture, according to Article XXXV, except when found on board a vessel bound for territory belonging to or occupied by the enemy, or for the armed forces of the enemy, and when it was not to be discharged at an intervening neutral port. The ship's papers were to be regarded as conclusive proof both as to the voyage on which the vessel was engaged, and as to the port of discharge of the goods, unless she was found clearly out of the course indicated by her papers, and unable to give adequate reasons to justify such deviation.[9] In the attempt to render the doctrine of continuous voyage inapplicable to conditional contraband, it would have been desirable to indicate with greater precision the circumstances when articles within that category should be free from the danger of condemnation. The effort to compensate a belligerent for the restriction applied with respect to the doctrine of continuous voyage, resulted in an arrangement which removed safeguards supposedly surrounding articles deemed conditional contraband, and served to obliterate the distinction between them and articles acknowledged to be absolute contraband.[10]

[6] For the text of the Declaration of London see Charles' Treaties, 268, also Naval War College, Int. Law Topics, 1909, 169.

[7] It was declared that this last exception did not apply to a consignment coming under Art. XXIV (4) of gold and silver in coin or bullion, and paper money.

[8] Art. XXXIV.

[9] See report by Mr. Renault in behalf of the Drafting Committee with respect to Articles XXXIII–XXXV, Charles' Treaties, 300–302; also report of the American delegates (Rear Admiral Stockton and Professor Wilson) to the Secy. of State, *id.*, 332, 334, 335.

Also instructions of Sir Edward Grey, British Foreign Secy., to Lord Desart, British plenipotentiary at the London Conference, Dec. 1, 1908, Misc. Nov. 4, 1909, International Naval Conference, cd. 4554, 20, 23; J. B. Scott, "The Declaration of London," *Am. Jour. Int. Law*, VIII, 274 and 520.

[10] Declares Professor Moore: "These grounds of inference are so vague and general hat they would seem to justify in almost any case the presumption that the cargo, if bound

Events of the World War served to emphasize the reluctance of belligerent states to observe uniform respect for the theory of conditional contraband as it had been advocated by neutral Powers in the Russo-Japanese War.

The controversy between the United States and Great Britain with respect to foodstuffs in 1914 and 1915, concerned the treatment of cargoes consigned to neutral ports rather than those consigned to, and on board of vessels bound for, Germany.[11] Sir Edward Grey, British Foreign Secretary, took occasion, however, to declare that the most difficult questions in connection with conditional contraband arise with reference to the shipment of foodstuffs, and acknowledged that no country had in modern times maintained more stoutly than Great Britain the principle that a belligerent should abstain from interference with such articles intended for a civil population. He questioned, however, whether the existing rules with regard to conditional contraband, framed as they were with the object of protecting so far as possible supplies intended for the civil population, remained effective for the purpose, or were suitable to existing conditions. He said that the principle involved was one which the British Government had constantly had to uphold against the opposition of continental Powers. In the absence of some certainty that the rule would be respected by both parties to the existing conflict, he expressed doubt whether it should be regarded as an established principle of international law.[12] He contended also that elaborate machinery had been organized by the enemy for the supply of foodstuffs for the use of the German armies from overseas. He declared that under such circumstances it would be absurd to give any definite pledge that in cases where supplies could be proved to be for the use of the enemy forces, they should be given complete immunity by the simple expedient of dispatching them to an agent in a neutral port. The reason, he

to any enemy port, was 'destined for the use of the armed forces or of a government department of the enemy State.' Any merchant established in the enemy country, who deals in the things described, will sell them to the Government; and if it becomes public that he does so, it will be 'well known' that he supplies them. Again, practically every important port is a 'fortified place'; and yet the existence of fortifications would usually bear no relation whatever to the eventual use of provisions and various other articles mentioned. Nor can it be denied that, in this age of railways, almost any place may serve as a 'base' for supplying the armed forces of the enemy. And of what interest or advantage is it to a belligerent to prevent the enemy from obtaining supplies from a 'base,' from a 'fortified place,' or from a merchant 'well known' to deal with him, in his own country, if he is permitted freely to obtain them from other places and persons, and especially, as countries having land boundaries can for the most part easily do, through a neutral port?" "Contraband of War," Philadelphia, 1912, p. 39.

[11] Mr. Bryan, Secy. of State, to Mr. W. H. Page, American Ambassador at London, telegram, Dec. 26, 1914, American White Book, European War, I, 39; Spl. Supp. *Am. Jour. Int. Law*, IX, 55.

[12] Sir Edward Grey, British Foreign Secy., to Mr. W. H. Page, American Ambassador at London, Feb. 10, 1915, *id.*, White Book, 44, 50, 51; Spl. Supp. 65.

said, for drawing a distinction between foodstuffs intended for the civil population and those for the armed forces or enemy government disappeared when the distinction between the civil population and the armed forces itself disappeared.[13] He declared also that the power to requisition would be used to the fullest extent in order to make sure that the wants of the military were supplied, and that however much goods might be imported for civil use, it was by the military they would be consumed if military exigencies so required, especially in view of the fact that the German Government had taken control of all the foodstuffs in the country. It is believed that in point of principle this argument was unanswerable. If it could be shown that all provisions imported into the territory of a belligerent state would be likely to minister to the needs of its military and naval forces by reason of a general shortage of foodstuffs, the attempts of neutral traders to ship such articles to that territory would constitute participation in the war and transform their traffic into one of contraband.

In early stages of the World War, foodstuffs were scheduled as conditional contraband in the lists announced by Great Britain, France and Russia. Germany indicated a readiness to respect the substance of the Declaration of London (which treated foodstuffs as conditional contraband), and to apply its provisions, if they were not disregarded by other belligerents.[14] On April 18, 1915, the German prize ordinance "in retaliation of the regulations adopted by England and her Allies, deviating from the London Declaration of maritime law" declared that foodstuffs and other specified articles "coming under the designation of conditional contraband," would be "considered as contraband of war."[15] On April 13, 1916, the British Foreign Office announced that the circumstances of the war were so peculiar that His Majesty's Government considered that for practical purposes the

[13] *Compare* the reasoning of Mr. Hammond, British Minister to the United States, in his communication to Mr. Jefferson, Secy. of State, Sept. 12, 1793, Am. State Pap., For. Rel. I, 240.

[14] Mr. Gerard, American Ambassador at Berlin, to Mr. Bryan, Secy. of State, telegram, Sept. 4, 1914, American White Book, European War, I, 27; Spl. Supp. *Am. Jour. Int. Law*, IX, 37.

It should be observed that while the Senate of the United States had on April 24, 1912, advised and consented to the ratification of the Declaration of London, it was not ratified by the President, and hence never proclaimed. Naval War College, Int. Law Topics, 1915, 93. On Aug. 6, 1914, the United States suggested to the belligerent Powers the advisability of adopting the declaration as a temporary code of naval warfare during the existing conflict. This suggestion was withdrawn Oct. 24, 1914, because of the unwillingness of certain belligerents to accept the declaration without modification. The Department of State simultaneously declared that the Government would insist that the rights and duties of the Government and citizens of the United States in the war be defined by the existing rules of international law and the treaties of the United States "without regard to the provisions of the declaration." Mr. Lansing, Acting Secy. of State, to Mr. Gerard, American Ambassador at Berlin, telegram, Oct. 24, 1914, American White Book, European War, I, 8; Spl. Supp. *Am. Jour. Int. Law*, IX, 7. Also correspondence, *id.*, White Book, 5–8; Spl. Supp., 1–7.

[15] American White Book, European War, I, 30; Spl. Supp. *Am. Jour. Int. Law*, IX, 43.

distinction between absolute and conditional contraband had ceased to have any value. So large a portion of the inhabitants of the enemy country were taking part, it was said, directly or indirectly, in the war that no real distinction could be drawn between the armed forces and the civilian population. It was declared that the enemy government had taken control, by a series of decrees and orders, of practically all the articles in the list of conditional contraband, so that they were then available for government use. So long as such exceptional conditions continued, British belligerent rights with respect to the two kinds of contraband were, as was said, the same, and treatment of them would have to be identical. Foodstuffs, with other articles normally in the conditional class, were placed in the broad category of articles deemed simply contraband.[16]

In the Naval Instructions of the United States Governing Maritime Warfare, issued June 30, 1917, "all kinds of fuel, food, foodstuffs, feed, forage, and clothing and articles and materials used in their manufacture" were declared to be contraband when "actually destined for the use of the enemy government or its armed forces, unless exempted by treaty."[17]

Conclusions

The foregoing discussions justify certain conclusions. They illustrate the failure of maritime Powers to reach any agreement with respect to the treatment to be accorded foodstuffs, and the insufficiency of any existing code to meet with general approval or to restrain belligerent action. Such failure and insufficiency may have been due in part to the circumstance that in the formulation of rules, the special interests of particular states or groups of states have overshadowed any united effort to promote justice for all. Attempts, moreover, to outline a procedure according, on the one hand, some measure of protection to articles such as foodstuffs, and on the other, exposing them to capture and condemnation, have been unresponsive to the practical requirements of international trade, on account of the constant doubt as to the safety of any neutral cargo destined, under almost any circumstances, to any belligerent port.[18]

[16] Inclosure in report of Mr. Reed, American Vice-Consul at London, to Mr. Lansing, Secy. of State, Apr. 20, 1916, American White Book, European War, III, 109; Spl. Supp. *Am. Jour. Int. Law*, X, 51.

[17] No. 24, p. 15. See, also, Nos. 70, 71 and 72. It is to be noted that the Naval Instructions of June 30, 1917, make no use of the term "conditional contraband."

[18] Declared Sir Edward Grey, British Foreign Secy., to Lord Desart, British plenipotentiary, to the London Naval Conference, Dec. 1, 1908: "It should be borne in mind that what the commerce of the world above all desires is certainty. The object of all rules on this subject should be to insure that a trader anxious to infringe in no way the accepted rights of belligerents, could make sure of not being, unwittingly, engaged in the carriage of contraband, and of thus avoiding the danger of condemnation and loss either of goods or ship, while the trader who deliberately shipped or carried contraband would do so with a knowledge of the risk he ran, and would have no claim to sympathy or compensation if his

By reason of the volume of exports from its territory, the United States still finds in the treatment of foodstuffs the most serious problem confronting it with respect to contraband. On principle, as has been observed, the right of a state engaged in war to treat as contraband any article of neutral commerce on its way to belligerent territory is attributable, not to inconvenience or annoyance occasioned by the prosperity of the enemy through the vigor of its foreign commerce, and still less to the necessities of the captor, but rather to the fact that the neutral contribution serves an essentially military end by strengthening the recipient as a belligerent. The question is, therefore, whether at the present time foodstuffs, howsoever consigned to belligerent territory, may be justly deemed to serve such an end. It must be clear that if in any conflict importations of them are shown to toughen the sinews of a belligerent by saving its soldiery from starvation, and to produce directly that effect, the right of the enemy to cut off that source of aid by dealing with the forms of sustenance as contraband, is unassailable. Nor, under such circumstances, is it less so, if food supplies are consigned to private agencies rather than governmental establishments. In either case there is a destination which the opposing belligerent may fairly regard as hostile.

Thus, at the present time, the merit of the claim of a neutral that exportations of foodstuffs from its domain to belligerent territory should not be dealt with as a trade in contraband, depends upon the fact that such articles entering that territory are not, and will not become a source of military strength to its sovereign. At the close of the eighteenth century it was not only easy for a neutral to make such a showing, but also very difficult for a belligerent to prove that its treatment of foodstuffs as contraband was for a purpose other than to harass a non-combatant population, rather than to deprive the enemy of a military advantage. It was this circumstance which rendered feasible and acceptable the numerous treaty provisions protecting foodstuffs from condemnation as contraband, and which accounted for the distinction as to ultimate use laid down by Sir William Scott and followed by the Supreme Court of the United States. Otherwise it would have been impossible for a practice to develop which tended to place upon a belligerent the burden of proving the ultimate hostile use of provisions bound for the territory of its enemy. The rule of restraint, in so far as there was one, manifested regard for actual conditions of neutral trade. It did not purport to cope with those which did not exist, and still less to hamper a belligerent in intercepting articles likely to fulfill a distinctly hostile purpose.

As war is now conducted, it is a probability rather than a possibility that foodstuffs imported into belligerent territory will serve a military end

ship or goods were captured and subsequently condemned by the due process of a prize court." Correspondence respecting the International Naval Conference, Misc. No. 4 (1909), cd. 4554, 20, 23.

and so be used for a hostile purpose. It may be doubted whether, in a conflict greatly taxing the strength of the participants where the entire male population capable of bearing arms is called to the colors and where the power of requisition is lodged in and exercised by a central government, the necessary showing as to non-military use can be made. Reason for doubt becomes strong where a belligerent state, the population of whose territory furnishes large importers, lacks a supply of food sufficient to maintain the inhabitants of its domain. It is not suggested, however, that in a particular case assurance may not be given, convincing to all concerned, that no military advantage will be gained or taken by a belligerent from imported foodstuffs. In such a situation a neutral state would have the strongest ground to protest against their treatment as contraband. It must, nevertheless, be acknowledged that the temptation of a belligerent to use for a military purpose any articles adapted for that purpose and within its reach, might prove irresistible if the need were imperative. The danger of enabling such a state to receive into its domain what, under any circumstances, might serve to avert defeat or prolong the war cannot be ignored.

It is clear that a just solution of the problem forbids that the matter be left to vague surmises indissolubly connected with the application of the theory of conditional contraband. There should be no recrudescence of arguments once prevailing in British and American prize courts on account of conditions of trade long since obsolete. The need of general and precise agreement among maritime Powers is obvious. The possibility of effecting one is believed to depend upon the candor and readiness with which states concerned, such as the United States, acknowledge the applicability of the fundamental principle that a belligerent may intercept whatever offers military aid to its adversary. Such acknowledgement is not inconsistent with the resonableness of an unmolested neutral trade in that which does not in fact afford such aid. New rules must, however, point to a definite and authoritative mode of establishing the innocence of the traffic. It may be fairly contended that existing conditions of war place the burden squarely upon those who claim the right to be unmolested. Neutral as well as belligerent governmental assurance ought to be given the state called upon to forego the right of capture and confiscation. In a word, the right to deal with foodstuffs as contraband must be recognized, and simultaneously that of neutrals to demand that a belligerent refrain from exercising its privilege in case of a sufficient showing as specified by general agreement, that such articles will serve no military end. In the absence of such a showing, it is not unreasonable that foodstuffs consigned to belligerent territory should be deemed to have a hostile destination. The bare need of provisions for its own use should never, however, suffice to excuse a belligerent from dealing with them as contraband. That excuse requires no invocation where the neutral claim to immunity fails to be supported by the requisite proofs of its merit.

It is in the nature and scope of assurance of innocent use that lies the hope of retaining for neutral states the enjoyment of a trade which, as war is now waged, must otherwise be regarded as a traffic in contraband.[19] It is not suggested, however, that adequate assurance may always be given, or that a belligerent may not with reason decline as insufficient that which is offered in a particular case.[20]

If it is permitted at this time to make a concrete suggestion for the consideration of the Second, and possibly also the Third Subcommittee, it would be the following:

That the Committee for the Advancement of International Law propose, first, that the United States consider the formal abandonment of the doctrine of conditional contraband, and specifically with reference to the treatment of foodstuffs; secondly, that the United States consider the feasibility of proposing a general agreement concerning the operation and effect of neutral governmental certification of the non-hostile uses of neutral foodstuffs destined to hostile territory, as a safeguard against capture and condemnation.

President Root. The suggestions made by Mr. Hyde at the close of his very interesting paper will be referred to the Committee on Advancement of International Law and to Subcommittee No. 2 without any further formality.

I now have the pleasure of presenting for the discussion of the topic illustrative of the work of Subcommittee No. 3, under the head of "Continuous voyage," Mr. George Grafton Wilson, Professor of International Law in Harvard University.

[19] See in this connection the views of Professor John Bassett Moore in address before American Philosophical Society, Philadelphia, 1912; and also at St. Louis, in 1915.

[20] Food imported into belligerent territory for any class of the population necessarily releases for consumption other food, and so tends to cause each shipload received from abroad to become an indirect source of maintenance of the military and naval forces, even if consumed entirely by persons unattached thereto. Thus the power of substitution accorded the belligerent whose civil population is maintained by imports may prove a vital means of averting the starvation of armies.

The United States as a belligerent in 1917 and 1918 applied this principle in limiting exports of foodstuffs to neutral European States in close proximity to Germany. It became important that American exports, although to be consumed by the inhabitants of neutral territories, should not prove to be the means of releasing for export therefrom to Germany provisions which otherwise could not be spared. The United States demanded, therefore, assurance that neutral States importing American foodstuffs should not thereby become special purveyors to the enemy. See, for example, statement issued by War Trade Broad, in Official Bulletin for May 4, 1918, respecting a general commercial agreement between the United States and Norway, signed by Mr. Vance C. McCormick, chairman of the War Trade Board, and by Dr. Nansen, special representative of the Norwegian Government.